Lesser-included offenses and necessarily-included offenses, organized by statute numbers of both greater and lesser offenses……..Revised 11/2009

Title 13 Offenses:

Chapter 10, Preparatory Offenses:

A.R.S. § 13-1001: Attempt

A.R.S. § 13-110 allows a defendant to plea bargain to an attempted offense even though the offense has been completed, because attempt is generally a lesser-included offense of the intended crime.1 Nevertheless, the trial court need not always instruct jurors on attempt; such an instruction is only warranted when the evidence supports it. If the evidence shows only the completed offense or nothing at all, the court should not give any attempt instruction. *State v. Morgan*, 204 Ariz. 166, 170, ¶¶ 11-13, 61 P.3d 460, 464 (App. 2002).

Attempt to possess any controlled substance is a lesser-included offense of possession of that substance. *Stubblefield v. Trombino*, 197 Ariz. 382, 383, ¶ 4, 4 P.3d 437, 438 (App. 2000), citing *State v. Cornish*, 192 Ariz. 533, 538, 968 P.2d 606, 611 (App. 1998); see also *Matter of Rivkind*, 164 Ariz. 154, 155, 791 P.2d 1037, 1038 (1990).

A.R.S. § 13-1002: Solicitation:

Because attempt, solicitation, conspiracy, and facilitation are preparatory offenses, they are separate and distinct from substantive offenses. Therefore, solicitation to sell narcotic drugs is not a lesser-included offense of sale of narcotic drug; rather, it is a completely separate crime from the offense solicited. *State v. Tellez*, 165 Ariz. 381, 383-84, 799 P.2d 1, 3-4 (App. 1989).

The offense of solicitation to sell a narcotic drug was not a necessarily-included offense of sale of narcotic drug by an accomplice, because one can sell narcotics without soliciting their sale. Further, the defendant was not entitled to a lesser-included offense instruction because the indictment did not refer to the defendant's acting as an accomplice; therefore, the charging document did not describe any solicitation offense. *State v. Woods*, 168 Ariz. 543, 544, 815 P.2d 912, 913 (App. 1991).

Solicitation of sexual conduct with a minor, A.R.S. § 13-1405, is not a lesser-included offense of attempted sexual conduct with a minor, because a person can attempt oral sexual contact with a minor without requesting or soliciting the minor to engage in the contact. *State v. Fristoe*, 135 Ariz. 25, 31, 658 P.2d 825, 831 (App. 1982).

A.R.S. § 13-1003: Conspiracy:

Conspiracy to possess stolen property, A.R.S. § 13-1001, is not a lesser included offense of possession of stolen property, § 13-1802. *State v. Wilson*, 126 Ariz. 348, 352, 615 P.2d 645, 649 (App. 1980)

A.R.S. § 13-1004: Facilitation:

In *State v. Garcia*, 176 Ariz. 231, 860 P.2d 498 (App. 1993), the defendant driver turned the car around and slowly drove past the victim's home so his passenger could shoot at the house. Although the defendant driver was charged with aggravated assault as the shooter's accomplice, the defendant was not entitled to a jury instruction on facilitation as a lesser-included offense of aggravated assault. This was so because facilitation is not a necessarily-included offense of aggravated assault, and because the charging document did not describe the lesser offense of facilitation of aggravated assault. *State v. Garcia,* 176 Ariz. 231, 233-34, 860 P.2d 498, 500-01 (App. 1993).

Facilitation, A.R.S. § 13-1004, is not a necessarily-included offense of first degree murder, A.R.S. § 13-1105, because it is obviously possible to commit first degree murder without committing the offense of facilitation. Further, the charging document does not "describe" the lesser offense of facilitation when it merely cites the statutory provisions of accomplice liability. Therefore, the defendant was not entitled to an instruction on facilitation as a lesser-included offense of first degree murder. *State v. Scott,* 177 Ariz. 131, 140-141, 865 P.2d 792, 801-02 (1993).

Facilitation, A.R.S. § 13-1004, is not a necessarily-included offense of unlawful sale of drugs, since the sale can be committed without necessarily committing facilitation. *State v. Politte,* 136 Ariz. 117, 121, 664 P.2d 661, 665 (App. 1982).

Facilitation, A.R.S. § 13-1004, is not a lesser-included offense of either burglary or theft. *State v. Harris*, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App. 1982).

Chapter 11, Homicide

A.R.S. § 13-1102: Negligent homicide:

Negligent homicide is a lesser included offense of manslaughter. *State ex rel Thomas v. Duncan [Regan, RPI]*, 216 Ariz. 260, 165 P.3d 328 (App. 2007).

In *State v. Nieto*, 186 Ariz. 449, 924 P.2d 453 (App. 1996), the defendant fired a shotgun out of the window of a moving car into a group of people, killing one. He claimed that he did not intend to fire the gun and that he only intended to scare the people. The Court of Appeals noted that negligent homicide, A.R.S. § 13-1102, is generally a lesser-included offense of manslaughter, A.R.S. § 13-1103, because the only difference between the two offenses is the defendant's mental state at the time of the killing. *State v. Nieto,* 186 Ariz. 449, 456, 924 P.2d 453, 460 (App. 1996). But when the only reason that a defendant is unaware of a substantial and unjustifiable risk is his voluntary intoxication, and when the evidence showed that his conduct was at best reckless, negligent homicide is not a lesser-included offense of manslaughter. Thus, the court properly refused to give an instruction on negligent homicide. Id.

A manslaughter defendant was not entitled to an instruction on negligent homicide as a lesser-included offense because there was no evidence to support a theory that he "failed to perceive the risk that if he struck someone with enough force to drive a knife ten inches into his body, death could result." Rather, the evidence showed that he was aware of the great danger his knife attack presented to the victim. *State v. Ruelas*, 165 Ariz. 326, 329, 798 P.2d 1335, 1338 (App. 1990), remanded on other grounds, 165 Ariz. 298, 798 P.2d 1307 (1990).

A.R.S. § 13-1103: Manslaughter:

Negligent homicide is a lesser included offense of manslaughter. *State ex rel Thomas v. Duncan [Regan, RPI]*, 216 Ariz. 260, 165 P.3d 328 (App. 2007).

Reckless manslaughter, A.R.S. § 13-1103(A)(1), is a necessarily-included offense of knowing second degree murder, A.R.S. § 13-1104(A)(2). *State v. Hurley*, 197 Ariz. 400, 403, ¶ 14, 4 P.3d 455, 458 (App. 2000). This is so because recklessly is a lesser-included mental state of knowingly. Accordingly, "[a] charge that a defendant killed another person knowing that his conduct would cause death or serious physical injury necessarily includes an allegation that the defendant acted recklessly by being aware of and consciously disregarding a substantial and unjustifiable risk that his conduct could result in death." *Id.*

Reckless manslaughter instruction is proper in second-degree murder case if the evidence would support a finding that the defendant committed the murder recklessly, but not under circumstances manifesting extreme indifference to human life and not through conduct that created a grave risk of death. *State v. Valenzuela*, 194 Ariz. 404, 406-07, ¶ 11, 984 P.2d 12, 14-15 (1999); *State v. Govan*, 154 Ariz. 611, 615, 744 P.2d 712, 716 (App. 1987). In State v. Davis, 154 Ariz. 370, 372, 742 P.2d 1356, 1358 (App. 1987), the defendant shot and killed the victim and was charged with first degree murder. She requested instructions on all lesser-included offenses. The trial court instructed the jury on first degree murder, second degree murder, manslaughter, and negligent homicide. However, the trial court instructed the jury only on "heat of passion" manslaughter, not on reckless manslaughter. The defendant was convicted of second degree murder. The Court of Appeals held that the trial court's failure to instruct on reckless manslaughter was fundamental error and reversed the defendant's conviction.

Although manslaughter, A.R.S. § 13-1103, is a lesser-included offense of second degree murder, § 13-1105, a defendant's acquittal on a manslaughter charge does not necessarily mean that the defendant did not commit second degree murder. This is so because the manslaughter statute "specifies a different circumstance as a requirement to find the lesser offense," namely, that the defendant acted "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." *Peak v. Acuna*, 203 Ariz. 83, 84, ¶¶ 5-6, 50 P.3d 833, 834 (2002).

Manslaughter, A.R.S. § 13-1103, can be a lesser-included offense of first degree murder, A.R.S. § 13-1105, when the defendant admits killing the victim, thus making the question whether the murder was premeditated or under a "sudden quarrel or heat of passion," as long as there is sufficient evidence from which the trier or fact could find "heat of passion." *Appeal in Maricopa County Juv. Action No. JV-506561,* 182 Ariz. 60, 63, 893 P.2d 60, 63 (App. 1994).

A defendant charged with first degree murder was not entitled to an instruction on reckless manslaughter or negligent homicide when the evidence showed that the victim and the defendant argued and the victim slapped the defendant, who then went back to his car, got his gun, and fired multiple shots at the victim, wounding her. The victim hid under a car, and the defendant came up to her, talked to her, and then shot her twice more, killing her. The evidence showed the defendant's conduct was deliberate, not reckless. *State v. Ortiz*, 158 Ariz. 528, 534, 764 P.2d 13, 19 (1988). Similarly, in *State v. Vickers,* 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989), the Court noted that the record did not support a reckless manslaughter instruction because Vickers did not "recklessly disregard the risk" to the victim, but rather "created the risk" through a number of deliberate actions that showed planning and premeditation.

In *State v. Nieto*, 186 Ariz. 449, 924 P.2d 453 (App. 1996), the defendant fired a shotgun out of the window of a moving car into a group of people, killing one. He claimed that he did not intend to fire the gun and that he only intended to scare them. The Court of Appeals noted that negligent homicide, A.R.S. § 13-1102, is generally a lesser-included offense of manslaughter, A.R.S. § 13-1103, because the only difference between the two offenses is the defendant's mental state at the time of the killing. *State v. Nieto,* 186 Ariz. 449, 456, 924 P.2d 453, 460 (App. 1996). However, when a defendant is unaware of a substantial and unjustifiable risk solely because of voluntary intoxication, negligent homicide is not a lesser-included offense of manslaughter. Thus, the court properly refused to give an instruction on negligent homicide. Id.

A manslaughter defendant was not entitled to an instruction on negligent homicide as a lesser-included offense because there was no evidence to support a theory that he "failed to perceive the risk that if he struck someone with enough force to drive a knife ten inches into his body, death could result." Rather, the evidence showed that he was aware of the great danger his knife attack presented to the victim. *State v. Ruelas*, 165 Ariz. 326, 329, 798 P.2d 1335, 1338 (App. 1990), remanded on other grounds, 165 Ariz. 298, 798 P.2d 1307 (1990).

Manslaughter by aiding another person to commit suicide, A.R.S. § 13-1103(A)(3), is not a necessarily-included offense of first degree murder, A.R.S. § 13-1105. *State v. Khoshbin*, 166 Ariz. 570, 573, 804 P.2d 103, 106 (App. 1990). Nor was any instruction on aiding suicide necessary when the evidence showed the victim was shot in the back of the head from two feet or more away. Id.

A.R.S. § 13-1104: Second degree murder

Second-degree murder, A.R.S. § 13-1104, is a lesser-included offense of premeditated first-degree murder, A.R.S. § 13-1105. *State v. Nordstrom*, 200 Ariz. 229, 253, ¶ 82, 25 P.3d 717, 741 (2001); *State v. Canion*, 199 Ariz. 227, 231, ¶ 13, 16 P.3d 788, 792 (App. 2000). But when a defendant who is charged with first degree murder denies killing the victim, and no evidence provides a basis for a second degree murder charge, the trial court may properly refuse to instruct the jury on second degree murder. *State v. Jones*, 203 Ariz. 1, 11, ¶ 37, 49 P.3d 273, 283 (2002); *State v. Sharp*, 193 Ariz. 414, 422-23, ¶¶ 28-29, 973 P.2d 1171, 1179-80 (1999). Thus, when the defendant does not argue lack of premeditation or claim that he innocently or mistakenly committed the acts that led to the victim's death, such that the defendant is either guilty as charged or not guilty, the trial court should not give a lesser-included offense instruction. *State v. Van Adams*, 194 Ariz. 408, 414, ¶¶ 14-15, 984 P.2d 16, 22 (1999), citing and quoting *State v. Salazar*, 173 Ariz. 399, 408, 844 P.2d 566, 575 (1992); see also *State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996).

Reckless manslaughter, A.R.S. § 13-1103(A)(1), is a necessarily-included offense of knowing second degree murder, A.R.S. § 13-1104(A)(2). *State v. Hurley*, 197 Ariz. 400, 403, ¶ 14, 4 P.3d 455, 458 (App. 2000). This is so because recklessly is a lesser-included mental state of knowingly. Accordingly, "[a] charge that a defendant killed another person knowing that his conduct would cause death or serious physical injury necessarily includes an allegation that the defendant acted recklessly by being aware of and consciously disregarding a substantial and unjustifiable risk that his conduct could result in death." Id.

Although manslaughter is a lesser-included offense of second degree murder, a defendant's acquittal on a manslaughter charge does not necessarily mean that the defendant did not commit second degree murder. This is so because the manslaughter statute "specifies a different circumstance as a requirement to find the lesser offense," namely, that the defendant acted "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." *Peak v. Acuna*, 203 Ariz. 83, 84, ¶¶ 5-6, 50 P.3d 833, 834 (2002).

Reckless manslaughter instruction is proper in second-degree murder case if the evidence would support a finding that the defendant committed the murder recklessly, but not under circumstances manifesting extreme indifference to human life and not through conduct that created a grave risk of death. *State v. Valenzuela*, 194 Ariz. 404, 406-07, ¶ 11, 984 P.2d 12, 14-15 (1999).

Reckless driving is not a necessarily-included offense of second degree murder because it requires proof of an element – that the defendant was driving a vehicle – that is not required to prove second degree murder. *State v. Sucharew*, 205 Ariz. 16, 66 P.3d 59 (App. 2003).

A.R.S. § 13-1105: First degree murder

Premeditated murder:

Second degree murder, A.R.S. § 13-1104, is a lesser-included offense of premeditated first degree murder, A.R.S. § 13-1105. *State v. Nordstrom*, 200 Ariz. 229, 253, ¶ 82, 25 P.3d 717, 741 (2001); *State v. Canion*, 199 Ariz. 227, 231, ¶ 13, 16 P.3d 788, 792 (App. 2000).

If the evidence supports such an instruction, a trial court should instruct a jury on second degree murder as a lesser-included offense of premeditated first degree murder, and instruct them that if they cannot agree on the first degree murder charge after reasonable efforts, they may then consider whether the State has proven second degree murder beyond a reasonable doubt. *State v. Martinez*, 196 Ariz. 451, 460-61, ¶ 38, 999 P.2d 795, 804-05 (2000). But when the evidence shows only that the defendant acted with premeditation, so that there is no rational way that a jury would be able to find the elements of first degree murder and fail to find premeditation, the trial court should not instruct the jury on second degree murder. *State v. Cook*, 170 Ariz. 40, 59, 821 P.2d 731, 750 (1991).

In all capital cases, the trial court must instruct the jury on all lesser-included offenses reasonably supported by the evidence even if the defendant does not request such instructions, and even over the defendant's objection. *State v. Wood,* 180 Ariz. 53, 65, 881 P.2d 1158, 1170 (1994); *State v. Comer*, 165 Ariz. 413, 422, 799 P.2d 333, 342 (1990); *State v. Cruz*, 189 Ariz. 29, 938 P.2d 78 (App. 1996), superseded by statute on other grounds, see *State v. Sierra-Cervantes*, 201 Ariz. 459, 37 P.3d 432 (App. 2001); *State v. Whittle*, 156 Ariz. 400, 403, 752 P.2d 489, 492 (App. 1985), approved as modified on other grounds, 156 Ariz. 405, 752 P.2d 494 (1988). But when no death penalty is possible in a murder case (as, when the State has decided not to seek the death penalty), the defense can make a tactical choice to give the jury only the option to find the defendant guilty or innocent on the offense charged, rather than on some lesser-included offense. Id.

Facilitation, A.R.S. § 13-1004, is not a necessarily-included offense of first degree murder, A.R.S. § 13-1105, because it is obviously possible to commit first degree murder without committing the offense of facilitation. Further, the charging document does not "describe" the lesser offense of facilitation when it merely cites the statutory provisions of accomplice liability. *State v. Scott*, 177 Ariz. 131, 140-141, 865 P.2d 792, 801-02 (1993).

Manslaughter by aiding another person to commit suicide, A.R.S. § 13-1103(A)(3), is not a necessarily-included offense of first degree murder, A.R.S. § 13-1105. *State v. Khoshbin*, 166 Ariz. 570, 573, 804 P.2d 103, 106 (App. 1990). Nor was any instruction on aiding suicide necessary when the evidence showed the victim was shot in the back of the head from two feet or more away. *Id*.

In a murder case in which the victim dies as a result of an assault, the trial court is not required to instruct the jury on the lesser-included offense of aggravated assault. No such instruction is required unless there is reasonable support on the record that the defendant's conduct was not the proximate cause of the victim's death. *State v. Sanchez,* 165 Ariz. 164, 169-170, 797 P.2d 703, 708-09 (App. 1990).

Assault, A.R.S. § 13-1203, is not a lesser-included offense of attempted murder, A.R.S. § 13-1105, because a defendant may attempt to murder someone and not thereby cause physical injury or place another in reasonable apprehension of harm. *State v. Sanders*, 205 Ariz. 208, **216**, 68 P. 3d 434, 442 (App. 2003).

Felony murder:

First degree felony murder has no lesser-included offenses. *State v. Nordstrom*, 200 Ariz. 229, 253, ¶ 82, 25 P.3d 717, 741 (2001); State v. Bocharski, 200 Ariz. 50, 28, ¶ 41, 22 P.3d 43, 51 (2001); *State v. Canion*, 199 Ariz. 227, 231, ¶ 15, 16 P.3d 788, 792 (App. 2000).

In a felony murder case, the defendant is not entitled to an instruction on the underlying felony that resulted in a death, because felony murder has no lesser-included offenses. *State v. Schad*, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989), citing *State v. LaGrand,* 153 Ariz. 21, 30, 734 P.2d 563, 572 (1987).

Child abuse, A.R.S. § 13-3623, is not a lesser-included offense of felony murder. *State v. Lopez,* 174 Ariz. 131, 143, 847 P.2d 1078, 1089 (1992).

Burglary, A.R.S. § 13-1506, is not a lesser-included offense of felony murder. *State v. Leslie,* 147 Ariz. 38, 49, 708 P.2d 719, 730 (1985).

Attempted First Degree murder:

In *State v. Fernandez*, 216 Ariz. 545, 169 P.3d 641 (App. 2007), the Court of Appeals held that aggravated assault is not a lesser-included offense of attempted first-degree murder, as attempted first-degree murder does not require either serious physical injury or reasonable apprehension of imminent physical harm, one of which must be proven for aggravated assault.

Chapter 12, Assault and Related Offenses

A.R.S. § 13-1201: Endangerment:

Endangerment is not a necessarily-included offense of drive-by shooting, because it is possible to commit drive-by shooting by firing a weapon from a vehicle at an abandoned structure or vehicle when no other person is present. *State v. Hoover*, 195 Ariz. 186, 188, ¶ 12, 986 P.2d 219, 221 (App. 1998). However, if the charging document describes the offense of endangerment – as, for example, by specifying the fact that a person was present in the structure at which the defendant fired, or that the defendant fired at a person – endangerment may be a lesser-included offense under the facts of the particular case. *Id.* at ¶ 11.

Neither endangerment, A.R.S. § 13-1201, nor threatening or intimidating, § 13-1202, is a lesser included offense of aggravated assault, § 13-1204. *State v. Rineer*, 131 Ariz. 147, 148, 639 P.2d 337, 338 (App. 1981).

A.R.S. § 13-1202: Threatening or intimidating:

Misdemeanor threatening or intimidating, A.R.S. § 13-1202(A)(1), may be a lesser-included offense of felony threatening or intimidating to promote a street gang or criminal enterprise, § 13-1202(A)(3), if the charging document describes both the felony and the misdemeanor offense. *State v. Corona*, 188 Ariz. 85, 88-89, 932 P.2d 1356, 1359-60 (App. 1997).

Threatening or intimidating, A.R.S. § 13-1202, is not a lesser included offense of aggravated assault, § 13-1204. *State v. Noriega*, 142 Ariz. 474, 481, 690 P.2d 775, 782 (1984), overruled on other grounds by *State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990).

Assault, A.R.S. § 13-1203, is a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, but endangerment, § 13-13-2101, and threatening or intimidating, § 13-1202, are not lesser-included offenses of assault by a prisoner. *State v. Garcia,* 141 Ariz. 97, 103, 685 P.2d 734, 740 (1984). Even though the elements of endangerment and threatening can be found within the elements of assault by a prisoner, a violation of A.R.S. § 13-1206 also depends on the defendant's status as a prisoner in the custody of the State Department of Corrections, the Department of Juvenile Corrections, a law enforcement agency, or a county or city jail. "To be a lesser-included offense, the crimes of endangerment and threatening or intimidating must be committed by a prisoner. … There is no such crime as endangerment while a prisoner or threatening while a prisoner. The crimes of endangerment or threatening or intimidating are not lesser-included offenses of assault by a prisoner… ." *Id.*

Neither endangerment, A.R.S. § 13-1201, nor threatening or intimidating, § 13-1202, is a lesser included offense of aggravated assault, § 13-1204. *State v. Rineer*, 131 Ariz. 147, 148, 639 P.2d 337, 338 (App. 1981).

A.R.S. § 13-1203: Assault

Misdemeanor assault, pursuant to A.R.S. § 13-1203(A)(1) is not a lesser-included offense of child molestation (A.R.S. § 13-1410(A)) under the elements test, as assault requires that the defendant cause injury to another person, while child molestation does not include that element. Whether assault is a lesser-included offense under the charging document test is dependent upon whether the wording of the charging document described an assault. Here, the Court found that the charging document description of the child molestation did not describe an assault under A.R.S. § 13-1203(A)(1). *In Re James P.,* 214 Ariz. 420, 153 P.3d 1049 (App. 2007).

Assault under § 13-1203(A)(2), "reasonable apprehension," was the traditional crime of assault at common law. Assault under A.R.S. § 13-1203(A)(3), "knowing touching," is what was known at common law as "battery." Therefore, these offenses are distinct and neither is a lesser-included offense of the other. *State v. Sanders*, 205 Ariz. 208, 68 P.3d 434 (App. 2003).

Assault under § 13-1203(A)(3) is not a lesser-included offense of § 13-1203(A)(1), as their elements are distinct. *In Re Jeremiah T.,* 212 Ariz. 30, 126 P.3d 177 (App. 2006).

While simple assault is a lesser-included offense of aggravated assault, no instruction on simple assault is appropriate unless "the jury could rationally find that the State failed to prove the element distinguishing the greater offense from the lesser offense." When the defendant was charged with aggravated assault with a vehicle and there was no allegation that she committed any assault other than with the vehicle, she was guilty of aggravated assault or nothing, and was not entitled to an instruction on simple assault. *State v. Jansing*, 186 Ariz. 63, 68, 918 P.2d 1018, 1086 (App. 1996), overruled on other grounds by *State v. Bass*, 198 Ariz. 571, 12 P.3d 796 (2000).

A defendant charged with aggravated assault – attempting to place the victim in reasonable apprehension of physical injury with a gun – used a real gun. However, the victim thought the gun was a fake and was never actually afraid. The defendant was found guilty of attempted aggravated assault. The defendant was not entitled to an instruction on the lesser-included offense of assault even though the victim thought during the assault that the gun was fake, because the victim’s mistaken perception of the gun as false did not alter its character as a deadly weapon. *State v. Torres*, 156 Ariz. 150, 152, 750 P.2d 908, 910 (App. 1988).

Simple assault can be a lesser-included offense of sexual assault. *State v. Rushing*, 156 Ariz. 1, 3, 749 P.2d 910, 912 (1988).

Assault, A.R.S. § 13-1203, is not a lesser-included offense of attempted murder, A.R.S. § 13-1105, because a defendant may attempt to murder someone and not thereby cause physical injury or place another in reasonable apprehension of harm. *State v. Laffoon*, 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980).

Assault, A.R.S. § 13-1203, is a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, but endangerment, § 13-13-2101, and threatening or intimidating, § 13-1202, are not lesser-included offenses of assault by a prisoner. *State v. Garcia*, 141 Ariz. 97, 103, 685 P.2d 734, 740 (1984). Even though the elements of endangerment and threatening can be found within the elements of assault by a prisoner, a violation of A.R.S. § 13-1206 also depends on the defendant's status as a prisoner in the custody of the State Department of Corrections, the Department of Juvenile Corrections, a law enforcement agency, or a county or city jail. "To be a lesser-included offense, the crimes of endangerment and threatening or intimidating must be committed by a prisoner. … There is no such crime as endangerment while a prisoner or threatening while a prisoner. The crimes of endangerment or threatening or intimidating are not lesser included offenses of assault by a prisoner … ." *Id.*

Misdemeanor assault, pursuant to A.R.S. § 13-1203(A)(1) is not a lesser-included offense of child molestation (A.R.S. § 13-1410(A)) under the elements test, as assault requires that the defendant cause injury to another person, while child molestation does not include that element. *In Re James P.,* 214 Ariz. 420, 153 P.3d 1049 (App. 2007). Whether assault is a lesser-included offense under the charging document test is dependent upon whether the wording of the charging document described an assault. *Id.*

A.R.S. §13-1204: Aggravated Assault:

In *State v. Fernandez*, 216 Ariz. 545, 169 P.3d 641 (App. 2007), the Court of Appeals held that aggravated assault is not a lesser-included offense of attempted first-degree murder, as attempted first-degree murder does not require either serious physical injury or reasonable apprehension of imminent physical harm, one of which must be proven for aggravated assault.

Disorderly conduct by reckless handling, displaying or discharging a firearm, A.R.S. § 13-2904(6), is a necessarily-included offense of aggravated assault under A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2), intentionally placing a person in reasonable apprehension of imminent physical injury using a deadly weapon or dangerous instrument. This is so because one cannot intend to place a person in fear of imminent injury without also intending to disturb the person. *State v. Foster*, 191 Ariz. 355, 357, ¶ 9, 955 P.2d 993, 995 (App. 1998), citing *State v. Angle*, 149 Ariz. 499, 507, 720 P.2d 100, 108 (App. 1985) (Kleinschmidt, J., dissenting), adopted by 149 Ariz. 478, 720 P.2d 79 (1986). However, disorderly conduct is not a lesser-included offense of §§ 13-1203(A)(1) and 13-1204(A)(1), aggravated assault by recklessly causing physical injury, because a person who recklessly injures another "need not, and probably does not,

intend to disturb the other person." *Foster, id.* at ¶ 10. See also *State v. Miranda*, 198 Ariz. 426, 429, ¶ 13, 10 P.3d 1213, 1216 (App. 2000), approved, 200 Ariz. 67, 69, ¶ 8, 22 P.3d 506, 508 (2001) [holding that Angle controls the issue, so disorderly conduct under A.R.S. § 13-2904(A)(6) is a lesser-included offense of aggravated assault under § 13-2904(A)(2), and disapproving *State v. Cutright*, 196 Ariz. 567, 2 P.3d 657 (App. 1999), for holding that, under *Maricopa County Juvenile Action No. JV 133051*, 184 Ariz. 473, 475, 910 P.2d 18, 20 (App. 1995), disorderly conduct has an additional element not found in aggravated assault, namely, that the State must show that the victim of a disorderly conduct was "at repose of mind and peaceful intent" before the defendant acted].

In *State v. Lara*, 183 Ariz. 233, 902 P.2d 1337 (1995), the defendant slashed at the victim repeatedly with a knife, forcing the victim to back away and call for help. The undisputed evidence showed that the victim was in apprehension of imminent physical injury and it was "not possible that the jury could have found that [the victim] was only disturbed." Under the evidence presented at trial, the defendant was guilty of aggravated assault or nothing, so he was not entitled to a lesser-included offense instruction on disorderly conduct as a lesser-included offense of aggravated assault. *State v. Lara*, 183 Ariz. 233, 235, 902 P.2d 1337, 1339 (1995).

Attempted aggravated assault is a lesser-included offense of aggravated assault. *See Andrade v. Superior Court,* 183 Ariz. 113, 901 P.2d 461 (App. 1995).

In a murder case in which the victim dies as a result of an assault, the trial court is not required to instruct the jury on the lesser-included offense of aggravated assault. No such instruction is required unless there is reasonable support on the record that the defendant's conduct was not the proximate cause of the victim's death. *State v. Sanchez,* 165 Ariz. 164, 169-170, 797 P.2d 703, 708-09 (App. 1990).

A defendant charged with aggravated assault – attempting to place the victim in reasonable apprehension of physical injury with a gun – used a real gun. However, the victim thought the gun was a fake and was never actually afraid. The defendant was found guilty of attempted aggravated assault. The defendant was not entitled to an instruction on the lesser-included offense of assault even though the victim thought during the assault that the gun was fake, because the victim's mistaken perception of the gun as false did not alter its character as a deadly weapon. *State v. Torres,* 156 Ariz. 150, 152, 750 P.2d 908, 910 (App. 1988).

Threatening or intimidating, A.R.S. § 13-1202, is not a lesser included offense of aggravated assault, § 13-1204. *State v. Noriega*, 142 Ariz. 474, 481, 690 P.2d 775, 782 (1984), overruled on other grounds by *State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990).

Reckless driving, A.R.S. § 28-693, is not a lesser-included offense of aggravated assault, § 13-1204, because each offense requires proof of an element that the other does not. *State v. Seats*, 131 Ariz. 89, 92-93, 638 P.2d 1335, 1338-1339 (1981).

Neither endangerment, A.R.S. § 13-1201, nor threatening or intimidating, § 13-1202, is a lesser included offense of aggravated assault, § 13-1204. *State v. Rineer*, 131 Ariz. 147, 148, 639 P.2d 337, 338 (App. 1981).

Aggravated assault, A.R.S. § 13-1204, may be a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, when there is a dispute as to the defendant's status as a prisoner. However, when the defendant admitted he was a prisoner, but claimed that the victim misidentified him as the assailant, the defendant was not entitled to an instruction on aggravated assault as a lesser-included offense of assault by a prisoner, because there was no evidence presented to the jury that would have allowed the jury to find that the defendant was not a prisoner. *State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985).

A.R.S. § 13-1206: Dangerous or Deadly Assault by Prisoner or Juvenile

Assault, A.R.S. § 13-1203, is a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, but endangerment, § 13-13-2101, and threatening or intimidating, § 13-1202, are not lesser-included offenses of assault by a prisoner. *State v. Garcia*, 141 Ariz. 97, 103, 685 P.2d 734, 740 (1984). Even though the elements of endangerment and threatening can be found within the elements of assault by a prisoner, a violation of A.R.S. § 13-1206 also depends on the defendant's status as a prisoner in the custody of the State Department of Corrections, the Department of Juvenile Corrections, a law enforcement agency, or a county or city jail. "To be a lesser-included offense, the crimes of endangerment and threatening or intimidating must be committed by a prisoner. … There is no such crime as endangerment while a prisoner or threatening while a prisoner. The crimes of endangerment or threatening or intimidating are not lesser-included offenses of assault by a prisoner… ." *Id.*

Aggravated assault, A.R.S. § 13-1204, may be a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, when there is a dispute as to the defendant's status as a prisoner. However, when the defendant admitted he was a prisoner, but claimed that the victim misidentified him as the assailant, the defendant was not entitled to an instruction on aggravated assault as a lesser-included offense of assault by a prisoner, because there was no evidence presented to the jury that would have allowed the jury to find that the defendant was not a prisoner. *State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985).

A.R.S. § 13-1209: Drive-by Shooting:

Because disorderly conduct, A.R.S. § 13-2904, requires proof of an element – namely, that the defendant intend or know that his conduct will disturb someone's peace and quiet – not found in drive-by shooting, A.R.S. § 13-1209, disorderly conduct is not a necessarily-included offense of drive-by shooting. *State v. Cisneroz*, 190 Ariz. 315, 317, 947 P.2d 889, 891 (App. 1997). Accord, *State v. Torres-Mercado*, 191 Ariz. 279, 282, 955 P.2d 35, 38 (App. 1997)

Endangerment is not a necessarily-included offense of drive-by shooting because it is possible to commit drive-by shooting by firing a weapon from a vehicle at a vacant structure with no one around. *State v. Hoover*, 195 Ariz. 186, 188, ¶ 12, 986 P.2d 219, 221 (App. 1998). However, if the charging document describes the offense of endangerment – as, for example, it includes the fact that the defendant fired at a person – endangerment may be a lesser-included offense under the facts of the particular case. Id. at ¶ 11. See also *State v. Torres-Mercado*, 191 Ariz. 279, 283, 955 P.2d 35, 39 (App. 1997) [Even assuming, without deciding, that it would be impossible to commit drive-by shooting without committing endangerment, a lesser-included offense instruction was still not warranted in this case because the defendant did not deny that shots were fired from a vehicle into an occupied house and trailer, but merely argued that he was not the person who fired the shots].

Chapter 13, Kidnapping and related offenses

A.R.S. § 13-1303: Unlawful Imprisonment:

Unlawful imprisonment, A.R.S. § 13-1303, is a necessarily-included offense of kidnapping, A.R.S. § 13-1304, because the only difference between the two crimes is the added element of intent required for kidnapping. *State v. Detrich*, 188 Ariz. 57, 61, 932 P.2d 1328, 1332 (1997); State v. Detrich, 178 Ariz. 380, 384, 873 P.2d 1302, 1306 (1994); *State v. Tschilar*, 200 Ariz. 427, 437, ¶ 40, 27 P.3d 331, 341 (App. 2001). However, the trial court need not instruct on unlawful imprisonment unless the evidence presented at trial supports the lesser offense. When the evidence showed that a stranger took the victim to a secluded place in the dark and stabbed her, and the defendant offered only an alibi defense, the evidence showed only kidnapping, and there was no evidence to support an unlawful imprisonment instruction. See *State v. Bolton*, 182 Ariz. 290, 311-12, 896 P.2d 830, 829-30 (1995); *State v. Atwood* 171 Ariz. 576, 628, 832 P.2d 593, 645 (1992), disapproved on other grounds, State v. Nordstrom, 200 Ariz. 229, 241, ¶ 25, 25 P.3d 717, 729 (2001). See also *State v. Trostle*, 191 Ariz. 4, 15-16, 951 P.2d 869, 880-81 (1997) [When defendant bound the victim's hands and feet and admitted knowing, or strongly suspecting, that his codefendant planned to kill her, he was not entitled to an instruction on unlawful imprisonment as a lesser-included offense of kidnapping because the evidence showed only kidnapping or nothing.]

A.R.S. § 13-1304: Kidnapping:

Attempted kidnapping is a necessarily-included offense of kidnapping. *State v. Rainwater,* 187 Ariz. 603, 931 P.2d 1113 (App. 1996), approved, 189 Ariz. 367, 943 P.2d 727 (1997).

Unlawful imprisonment, A.R.S. § 13-1303, is a necessarily-included offense of kidnapping, A.R.S. § 13-1304, because the only difference between the two crimes is the added element of intent required for kidnapping. *State v. Detrich*, 188 Ariz. 57, 61, 932 P.2d 1328, 1332 (1997); *State v. Tschilar*, 200 Ariz. 427, 437, ¶ 40, 27 P.3d 331, 341 (App. 2001). Nevertheless, the trial court need not instruct on unlawful imprisonment unless the evidence presented at trial supports the lesser offense. When the evidence showed that a stranger took the victim to a secluded place in the dark and stabbed her, and the defendant offered only an alibi defense, the evidence showed only kidnapping, and there was no evidence to support an unlawful imprisonment instruction. See *State v. Bolton*, 182 Ariz. 290, 311-12, 896 P.2d 830, 829-30 (1995). See also *State v. Trostle*, 191 Ariz. 4, 15-16, 951 P.2d 869, 880-81 (1997) [When defendant bound the victim's hands and feet and admitted knowing, or strongly suspecting, that his codefendant planned to kill her, he was not entitled to an instruction on unlawful imprisonment as a lesser-included offense of kidnapping because the evidence showed only kidnapping or nothing.]

Kidnapping with the intent to place the victim or a third person in reasonable apprehension of imminent physical injury, A.R.S. § 13-1304(A)(4), is not a lesser-included offense or a separate offense of kidnapping with the intent to aid in the commission of a felony, § 13-1304(A)(3). Instead, each is one of the ways in which a person can commit kidnapping. *State v. Stough*, 137 Ariz. 121, 123, 669 P.2d 99, 101 (App. 1983).

Neither sexual abuse, A.R.S. § 13-1404, or attempted sexual abuse is a lesser-included offense of kidnapping, because one easily commit or attempt to commit kidnapping without committing sexual abuse, and vice versa. *State v. Harmon* 132 Ariz. 54, 57, 643 P.2d 1024, 1027 (App. 1982).

Kidnapping, A.R.S. § 13-1304, is not a lesser-included offense of "domestic violence" under § 13-3601 because § 13-3601 is a procedural statute and does not create a separate offense of "domestic violence." *State v. Schackart*, 153 Ariz. 422, 423, 737 P.2d 398, 399 (App. 1987).

Chapter 14, Sexual Offenses

A.R.S. § 13-1402: Indecent Exposure:

Indecent exposure, A.R.S. 13-1402, is not a lesser-included offense of public sexual indecency, § 13-1403. *Rolph v. City Court of City of Mesa*, 127 Ariz. 155, 159, 618 P.2d 1081, 1085 (1980).

A.R.S. § 13-1403: Public Sexual Indecency:

Indecent exposure, A.R.S. 13-1402, is not a lesser-included offense of public sexual indecency, § 13-1403. *Rolph v. City Court of City of Mesa*, 127 Ariz. 155, 159, 618 P.2d 1081, 1085 (1980).

Public sexual indecency, A.R.S. § 13-1403(A), is not a lesser-included offense of public sexual indecency to a minor, § 13-1403(B), because the subsection (A) offense contains the additional element that the person be reckless about whether the other person or persons present "would be offended or alarmed by the act." *State v. Jannamon,* 169 Ariz. 435, 440, 819 P.2d 1021, 1026 (App. 1991).

A.R.S. § 13-1404: Sexual abuse:

Sexual abuse, A.R.S. § 13-1404, is a lesser-included offense of sexual assault, § 13-1406. State v. Detrich, 188 Ariz. 57, 63, 932 P.2d 1328, 1334 (1997); *State v. Cuen*, 153 Ariz. 382, 383, 736 P.2d 1194, 1195 (App. 1987).

Sexual abuse, A.R.S. § 13-1404, is not a necessarily-included offense of child molesting, § 13-1410, because fondling the breasts of a female under the age of fifteen would be sexual abuse, but not child molestation. *State v. Patton*, 136 Ariz. 243, 244-245, 665 P.2d 587, 588-589 (App. 1983); *State v. Cousin*, 136 Ariz. 83, 86, 664 P.2d 233, 236 (App. 1983).

Neither sexual abuse, A.R.S. § 13-1404, or attempted sexual abuse is a lesser-included offense of kidnapping, because one easily commit or attempt to commit kidnapping without committing sexual abuse, and vice versa. *State v. Harmon* 132 Ariz. 54, *57, 643 P.2d 1024, 1027 (App. 1982).

A.R.S. § 13-1405: Sexual conduct with a minor:

Child molestation is not a lesser included offense of sexual conduct with a minor under the "elements" test, because – due to the different age requirements for the two crimes - it is not always a constituent part of sexual conduct with a minor. However, child molestation may be a lesser included offense of sexual conduct with a minor under the "charging document" test – where, as here, the charging document alleges that the victim is under 15 years of age. Here, the juvenile who was charged with sexual conduct with a minor had sufficient notice of the lesser included offense of child molestation, because the charging document described the elements of child molestation. *In Re Jerry C,* 214 Ariz. 270, 151 P.3d 553 (App. 2007).

Although attempted sexual conduct with a minor is a lesser-included offense of sexual conduct with a minor, the defendant was not entitled to a jury instruction on attempt because he confessed completed acts of sexual conduct with the minor. *State v. Morgan,* 204 Ariz. 166, 170, ¶¶ 11-13, 61 P.3d 460, 464 (App. 2002).

In *State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039 (App. 2000), the defendant was charged with child molestation and sexual conduct with a minor under fifteen years old. The victim testified that she was nine and ten years old when the defendant had sexual conduct with her, and was twelve at the time of trial. However, the prosecution did not present any documentation of the victim's age. Showing a videotape the defendant had made of the sex acts, defense counsel asked the trial court to let him argue to the jury that they could infer from the victim's physical development that she was over fifteen years old when the tape was made. The trial court refused to allow the defense to make that argument in the absence of any expert testimony about appearance and age. The jury found the defendant guilty as charged on all counts. On appeal, the defendant argued that the trial court should have instructed the jury on the lesser-included offense of sexual conduct with a minor over the age of fifteen. The Court found no error. The Court did not need to decide whether or not sexual conduct with a minor over the age of fifteen is a lesser-included offense of sexual conduct with a minor under the age of fifteen, because, by convicting the defendant of child molestation, the jury explicitly found that the victim was under fifteen. Further, the defendant was not entitled to an instruction on sexual conduct with a minor over the age of fifteen because there was no evidence to support such an instruction – that is, no evidence presented showed that

the victim was over fifteen. "Our supreme court has repeatedly recognized a distinction between a lack of proof of a fact and affirmative evidence tending to refute that fact." *State v. Marshall*, 197 Ariz. 496, 505, ¶ 36, 4 P.3d 1039, 1048 (App. 2000).

Sexual conduct with a minor, A.R.S. § 13-1405, is not a lesser-included offense of sexual assault, §13-1406. *State v. Villegas*, 132 Ariz. 433, 433, 646 P.2d 318, 318 (App. 1982).

Solicitation of sexual conduct with a minor, A.R.S. § 13-1405, is not a lesser-included offense of attempted sexual conduct with a minor, because a person can attempt oral sexual contact with a minor without requesting or soliciting the minor to engage in the contact. *State v. Fristoe*, 135 Ariz. 25, 31, 658 P.2d 825, 831 (App. 1982).

Child molestation is not a lesser included offense of sexual conduct with a minor under the "elements" test, because – due to the different age requirements for the two crimes - it is not always a constituent part of sexual conduct with a minor. *In Re Jerry C.*, 214 Ariz. 270, 151 P.3d 553 (App. 2007). However, child molestation may be a lesser included offense of sexual conduct with a minor under the "charging document" test – where the charging document alleges that the victim is under 15 years of age. *Id.* A juvenile who was charged with sexual conduct with a minor had sufficient notice of the lesser included offense of child molestation, where the charging document described the elements of child molestation. *Id.*

A.R.S. § 13-1406: Sexual assault:

Sexual abuse, A.R.S. § 13-1404, is a lesser-included offense of sexual assault, A.R.S. § 13-1406. *State v. Detrich*, 188 Ariz. 57, 63, 932 P.2d 1328, 1334 (1997); *State v. Cuen,* 153 Ariz. 382, 383, 736 P.2d 1194, 1195 (App. 1987).

Simple assault can be a lesser-included offense of sexual assault. *State v. Rushing* 156 Ariz. 1, 3, 749 P.2d 910, 912 (1988).

Sexual conduct with a minor, A.R.S. § 13-1405, is not a lesser-included offense of sexual assault, §13-1406. *State v. Villegas*, 132 Ariz. 433, 433, 646 P.2d 318, 318 (App. 1982).

A.R.S. § 13-1410: Child molestation:

Misdemeanor assault, pursuant to A.R.S. § 13-1203(A)(1) is not a lesser-included offense of child molestation (A.R.S. § 13-1410(A)) under the elements test, as assault requires that the defendant cause injury to another person, while child molestation does not include that element. Whether assault is a lesser-included offense under the charging document test is dependent upon whether the wording of the charging document described an assault. Here, the Court found that the charging document description of the child molestation did not describe an assault under A.R.S. § 13-1203(A)(1). *In Re James P.,* 214 Ariz. 420, 153 P.3d 1049 (App. 2007).

Child molestation is not a lesser included offense of sexual conduct with a minor under the "elements" test, because – due to the different age requirements for the two crimes - it is not always a constituent part of sexual conduct with a minor. However, child molestation may be a lesser included offense of sexual conduct with a minor under the "charging document" test – where, as here, the charging document alleges that the victim is under 15 years of age. Here, the juvenile who was charged with sexual conduct with a minor had sufficient notice of the lesser included offense of child molestation, because the charging document described the elements of child molestation. *In Re Jerry C,* 214 Ariz. 270, 151 P.3d 553 (App. 2007).

Contributing to the delinquency of a minor, A.R.S. § 13-3613, is a lesser-included offense of child molestation, § 13-1410. See *State v. Brown,* 191 Ariz. 102, 103, 952 P.2d 746, 747 (App. 1997); *State v. Sanderson*, 182 Ariz. 534, 543, 898 P.2d 483, 491 (App. 1995).

The defendant was charged with child molestation, A.R.S. § 13-1410. When the evidence showed that the defendant told a child to rub his legs and then moved so that the child had to touch his penis, the defendant was not entitled to an instruction on the lesser-included offense of attempted child molestation just because the child testified that he "accidentally bumped" the defendant's penis. The Court of Appeals reasoned that even if the child did not intend to touch the defendant's penis, the evidence showed that the defendant knowingly caused the contact by telling the child where to rub him and having the child touch his private parts. *State v. Hummer*, 184 Ariz. 603, 606, 911 P.2d 609, 612 (App. 1995).

Sexual abuse, A.R.S. § 13-1404, is not a necessarily-included offense of child molesting, § 13-1410, because fondling the breasts of a female under the age of fifteen would be sexual abuse, but not child molestation. *State v. Patton*, 136 Ariz. 243, 244-245, 665 P.2d 587, 588-589 (App. 1983); *State v. Cousin*, 136 Ariz. 83, 86, 664 P.2d 233, 236 (App. 1983).

Misdemeanor assault, pursuant to A.R.S. § 13-1203(A)(1) is not a lesser-included offense of child molestation (A.R.S. § 13-1410(A)) under the elements test, as assault requires that the defendant cause injury to another person, while child molestation does not include that element. *In Re James P.,* 214 Ariz. 420, 153 P.3d 1049 (App. 2007). Whether assault is a lesser-included offense under the charging document test is dependent upon whether the wording of the charging document described an assault. *Id.*

Child molestation is not a lesser included offense of sexual conduct with a minor under the “elements” test, because – due to the different age requirements for the two crimes - it is not always a constituent part of sexual conduct with a minor. *In Re Jerry C.*, 214 Ariz. 270, 151 P.3d 553 (App. 2007). However, child molestation may be a lesser included offense of sexual conduct with a minor under the “charging document” test – where the charging document alleges that the victim is under 15 years of age. *Id.* A juvenile who was charged with sexual conduct with a minor had sufficient notice of the lesser included offense of child molestation, where the charging document described the elements of child molestation. *Id.*

Chapter 15, Criminal Trespass and Burglary

A.R.S. § 13-1503: Criminal Trespass in the Second Degree:

Criminal trespass in the second degree, A.R.S. § 13-1503, is not a necessarily-included offense of burglary in the third degree, § 13-1506. *State v. Malloy*, 131 Ariz. 125, 130-31, 639 P.2d 315, 320-21 (1981); *State v. Ennis*, 142 Ariz. 311, 314, 689 P.2d 570, 573 (App. 1984). To convict a defendant of trespass in the second degree, the State must prove that the defendant was aware that his entry or remaining was unlawful. To prove burglary, the State need not prove that the defendant was aware that his entry or remaining was unlawful, but rather must only show a knowing or voluntary entry with the requisite intent. Malloy, id.; accord, *State v. Kozan*, 146 Ariz. 427, 429, 706 P.2d 753, 755 (App. 1985).

A.R.S. § 13-1504: Criminal Trespass in the First Degree:

When the defendant enters a structure, the crime of criminal trespass in the first degree, A.R.S. § 13-1504, is a lesser-included offense of burglary in the second degree, A.R.S. § 13-1507. *State v. Engram*, 171 Ariz. 363, 365, 831 P.2d 362, 364 (App. 1991).

A.R.S. § 13-1506: Burglary in the Third Degree:

When the nature of the burglarized structure is in question – that is, when the evidence establishes that the defendant entered a structure, and the only question is whether that structure was residential or nonresidential – burglary in the third degree of a nonresidential structure, A.R.S. § 13-1506, is a lesser-included offense of burglary in the second degree of a residential structure, A.R.S. § 13-1507. The elements of the two crimes are exactly the same, except that to prove burglary of a residential structure, one must prove one extra element, namely, that the structure is "adapted for both human residence and lodging." *State v. Bass*, 184 Ariz. 543, 545, 911 P.2d 549, 551 (App. 1995). But the only way that burglary in the third degree can be a lesser-included offense of burglary in the second degree is when the third degree burglary is of a structure, not a burglary of a fenced commercial or residential yard, because a yard is not a "structure" as defined in A.R.S. § 13-1501(8). Id. at 546, 911 P.2d at 552.

When a defendant enters a building with intent to commit a theft, to determine whether the burglary is residential or nonresidential, the first inquiry is whether the building is used for commercial purposes or as a residence. If the building is used as a residence, then the next question is whether the area of the building that the defendant entered is "one that makes the building more suitable, comfortable or enjoyable for human occupancy. If the answer is also yes, then the inquiries cease as the definition of residence subsumes any ‘lesser included structures’ and the burglary is of a residential structure." *State v. Gardella*, 156 Ariz. 340, 342, 751 P.2d 1000, 1002 (App. 1988). Thus, a basement of a residential home would be part of the residential structure even though the basement was used for storage rather than lodging. However, if the building is primarily commercial, the inquiry becomes one of the nature of the structure within the building and whether the included structure is used for lodging. Only if the included structure is used for residence or lodging (such as a separately securable apartment or hotel room) is the burglary a residential burglary. Thus, entry into a motel laundry room was a third degree burglary of a nonresidential structure. Id. To put it in other words, the term "residence" as it is used in the statute includes every structure connected with the residential structure to make it more suitable, comfortable or enjoyable for human occupancy. The definition of residence includes other structures within the residence, including those used for storage. *State v. Ekmanis*, 183 Ariz. 180, 182, 901 P.2d 1210, 1212 (App. 1995), citing *Gardella, supra*.

Burglary, A.R.S. § 13-1506, is not a lesser-included offense of felony murder. *State v. Leslie,* 147 Ariz. 38, 49, 708 P.2d 719, 730 (1985).

Burglary in the third degree, A.R.S. § 13-1506, and burglary in the second degree, § 13-1507, may be lesser-included offenses of burglary in the first degree, § 13-1508. See *State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984).

Shoplifting, A.R.S. § 13-1805, is not a lesser-included offense of burglary in the third degree, A.R.S. § 13-1506. *State v. Embree*, 130 Ariz. 64, 66, 633 P.2d 1057, 1059 (App. 1981).

Burglary, A.R.S. § 13-1506, is not a lesser included offense of robbery, § 13-1902. *State v. Clovis,* 127 Ariz. 75, 81, 618 P.2d 245, 251 (App. 1980).

Criminal trespass in the second degree, A.R.S. § 13-1503, is not a necessarily-included offense of burglary in the third degree, § 13-1506. *State v. Malloy*, 131 Ariz. 125, 130-31, 639 P.2d 315, 320-21 (1981); *State v. Ennis*, 142 Ariz. 311, 314, 689 P.2d 570, 573 (App. 1984). To convict a defendant of trespass in the second degree, the State must prove that the defendant was aware that his entry or remaining was unlawful. To prove burglary, the State need not prove that the defendant was aware that his entry or remaining was unlawful, but rather must only show a knowing or voluntary entry with the requisite intent. *Malloy, id.; accord, State v. Kozan,* 146 Ariz. 427, 429, 706 P.2d 753, 755 (App. 1985).

A.R.S. § 13-1507: Burglary in the Second Degree:

When the defendant enters a structure, the crime of criminal trespass in the first degree, A.R.S. § 13-1504, is a lesser-included offense of burglary in the second degree, A.R.S. § 13-1507. *State v. Engram*, 171 Ariz. 363, 365, 831 P.2d 362, 364 (App. 1991).

When the nature of the burglarized structure (residential or nonresidential) is in question, burglary of a nonresidential structure, A.R.S. § 13-1506, is a lesser-included offense of burglary in the second degree of a residential structure, A.R.S. § 13-1507. The elements of the two crimes are exactly the same, except that to prove burglary of a residential structure, one must prove one extra element, namely, that the structure is "adapted for both human residence and lodging." *State v. Bass*, 184 Ariz. 543, 545, 911 P.2d 549, 551 (App. 1995). But the only way that burglary in the third degree can be a lesser-included offense of burglary in the second degree is when the third degree burglary is of a structure, not a burglary of a fenced commercial or residential yard, because a yard is not a "structure." Id. at 546, 911 P.2d at 552.

Burglary in the third degree, A.R.S. § 13-1506, and burglary in the second degree, § 13-1507, may be lesser-included offenses of burglary in the first degree, § 13-1508. See *State v. Caldera,* 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984).

Attempted burglary in the second degree is a necessarily-included offense of attempted burglary in the first degree. *State v. Grijalva*, 137 Ariz. 10, 12, 667 P.2d 1336, 1338 (App. 1983).

A.R.S. § 13-1508: Burglary in the First Degree:

Attempted burglary in the second degree, A.R.S. § 13-1507, is a necessarily-included offense of attempted burglary in the first degree, § 13-1508. State v. *Grijalva*, 137 Ariz. 10, 12, 667 P.2d 1336, 1338 (App. 1983).

Attempted burglary in the second degree, A.R.S. § 13-1507, is a necessarily-included offense of attempted burglary in the first degree, § 13-1508. *State v. Grijalva*, 137 Ariz. 10, 12, 667 P.2d 1336, 1338 (App. 1983).

Chapter 17, Arson

A.R.S. § 13-1702, Reckless Burning:

Reckless burning, A.R.S. § 13-702, may be a lesser-included offense of arson of an occupied structure, § 13-1704, when the only difference between the two crimes is the required mental state (reckless or knowing). Therefore, if the evidence at trial supports a lesser-included offense instruction, an instruction on reckless burning may be appropriate. *State v. Bay*, 150 Ariz. 112, 117, 722 P.2d 280, 285, 722 P.2d 280. 285 (1986).

A.R.S. § 13-1704, Arson of an Occupied Structure:

Reckless burning, A.R.S. § 13-702, may be a lesser-included offense of arson of an occupied structure, § 13-1704, when the only difference between the two crimes is the required mental state (reckless or knowing). Therefore, if the evidence at trial supports a lesser-included offense instruction, an instruction on reckless burning may be appropriate. *State v. Bay*, 150 Ariz. 112, 117, 722 P.2d 280, 285, 722 P.2d 280. 285 (1986).

Chapter 18, Theft

A.R.S. § 13-1802, Theft:

Theft of property of a lesser value is not a lesser-included offense of theft of property of a greater value. The theft statute defines a single crime, with the punishment determined by the value of the stolen property; the value of the property is irrelevant to the question of guilt of innocence. *State v. Brokaw,* 134 Ariz. 532, 535, 658 P.2d 185, 188 (App. 1982).

Unlawful use of a means of transportation, A.R.S. § 13-1803, is a necessarily-included offense of theft by conversion, A.R.S. § 13-1802(2). That is, "it is impossible to commit theft of a vehicle by conversion without also committing joyriding." *State v. Griest*, 196 Ariz. 213, 214, ¶ 5, 994 P.2d 1028, 1029 (App. 2000); *State v. Kamai*, 184 Ariz. 620, 623, 911 P.2d 626, 629 (App. 1995).

Theft, A.R.S. § 13-1803, is a necessarily-included offense of robbery, A.R.S. § 13-1902, because all that transforms a theft into a robbery is the use or threat of force against any person, not necessarily only the person being dispossessed of the property. *State v. Strong,* 185 Ariz. 248, 252, 914 P.2d 1340, 1344 (App. 1995), citing *State v. Celaya*, 135 Ariz. 248, 252, 660 P.2d 849, 853 (1983). However, a robbery defendant is not entitled to a lesser-included offense instruction on theft if the evidence shows only that the defendant used force or threat of force to obtain the property. In such a case, the defendant is guilty of robbery or nothing. *State v. King*, 166 Ariz. 342, 343, 802 P.2d 1041, 1042 (App. 1990).

Unlawful failure to return rental property, A.R.S. § 13-1806, is not a lesser-included offense of theft by conversion, § 13-1802(A)(2), because one can clearly commit theft by conversion without violating a rental agreement. *State v. Newell*, 137 Ariz. 354, 356, 670 P.2d 1178, 1180 (App. 1983).

Shoplifting, A.R.S. § 13-1805, is not a lesser included offense of theft, § 13-1802. *State v. Teran,* 130 Ariz. 277, 278, 635 P.2d 870, 871 (App. 1981).

Conspiracy to possess stolen property, A.R.S. § 13-1001, is not a lesser included offense of possession of stolen property, § 13-1802. *State v. Wilson*, 126 Ariz. 348, 352, 615 P.2d 645, 649 (App. 1980)

A.R.S. § 13-1805, Shoplifting:

Shoplifting in violation of A.R.S. § 13-13-1805(A) is a necessarily-included offense of "facilitated shoplifting" under A.R.S. § 13-1805(I). *State v. Brown*, 204 Ariz. 405, 411, ¶ 22, 64 P.3d 847, 852-53 (App. 2003).

Shoplifting, A.R.S. § 13-1805, is not a lesser included offense of theft, § 13-1802. *State v. Teran,* 130 Ariz. 277, 278, 635 P.2d 870, 871 (App. 1981).

Shoplifting, A.R.S. § 13-1805, is not a lesser-included offense of burglary in the third degree, A.R.S. § 13-1506. *State v. Embree*, 130 Ariz. 64, 66, 633 P.2d 1057, 1059 (App. 1981).

A.R.S. § 13-1806, Unlawful Failure to Return Rental Property:

Unlawful failure to return rental property, A.R.S. § 13-1806, is not a lesser-included offense of theft by conversion, § 13-1802(A)(2), because one can clearly commit theft by conversion without violating a rental agreement. *State v. Newell*, 137 Ariz. 354, 356, 670 P.2d 1178, 1180 (App. 1983).

Chapter 19, Robbery

A.R.S. § 13-1902, Robbery:

Theft, A.R.S. § 13-1803, is a necessarily-included offense of robbery, A.R.S. § 13-1902, because all that transforms a theft into a robbery is the use or threat of force against any person, not necessarily only the person being dispossessed of the property. *State v. Strong,* 185 Ariz. 248, 252, 914 P.2d 1340, 1344 (App. 1995), citing *State v. Celaya,* 135 Ariz. 248, 252, 660 P.2d 849, 853 (1983).

Robbery, A.R.S. § 13-1902, is a necessarily-included offense of armed robbery, A.R.S. § 13-1904. *State v. Henry*, 176 Ariz. 569, 582, 863 P. 2d 861, 874 (1993). *State v. Scott,* 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996).

A person attempted to rob a gas station clerk at a convenience mart. The clerk testified that the assailant had a knife, but the surveillance videotape "arguably" did not show any weapon in the assailant's hands. The defendant admitted that he had been in the store but denied any part in the attack. The Court of Appeals held that attempted robbery, A.R.S. §§ 13-1001, -1902, is a necessarily-included offense of attempted armed robbery, A.R.S. §§ 13-1001, -1904, even when the defendant denies committing the offense, reasoning, "We see nothing inconsistent, illogical or improper about a defendant saying, 'I was not the person who committed the robbery, but even if you do not believe me, the evidence shows that whoever did commit it was not armed.'" *State v. McPhaul,* 174 Ariz. 561, 562, 851 P.2d 860, 861 (App. 1992), citing *State v. Dugan*, 125 Ariz. 194, 196, 608 P.2d 771, 773 (1980).

Burglary, A.R.S. § 13-1506, is not a lesser included offense of robbery, § 13-1902. *State v. Clovis,* 127 Ariz. 75, 81, 618 P.2d 245, 251 (App. 1980).

A.R.S. § 13-1903, Aggravated Robbery:

Theft is a necessarily-included offense of aggravated robbery, A.R.S. § 13-1903. *State v. Alexander,* 175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993).

A.R.S. § 13-1904, Armed Robbery:

Robbery, A.R.S. § 13-1902, is a necessarily-included offense of armed robbery, A.R.S. § 13-1904. *State v. Henry*, 176 Ariz. 569, 582, 863 P.2d 861, 874 (1993). *State v. Scott*, 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996).

A person attempted to rob a gas station clerk at a convenience mart. The clerk testified that the assailant had a knife, but the surveillance videotape "arguably" did not show any weapon in the assailant's hands. The defendant admitted that he had been in the store but denied any part in the attack. The Court of Appeals held that attempted robbery, A.R.S. §§ 13-1001, -1902, is a necessarily-included offense of attempted armed robbery, A.R.S. §§ 13-1001, -1904, even when the defendant denies committing the offense, reasoning, "We see nothing inconsistent, illogical or improper about a defendant saying, 'I was not the person who committed the robbery, but even if you do not believe me, the evidence shows that whoever did commit it was not armed.'" *State v. McPhaul*, 174 Ariz. 561, 562, 851 P.2d 860, 861 (App. 1992), citing *State v. Dugan,* 125 Ariz. 194, 196, 608 P.2d 771, 773 (1980).

In *State v. Felix*, 153 Ariz. 417, 737 P.2d 393 (App. 1986) defendant stuck a simulated gun into the victim's body, told him he had a gun, and demanded money. A third party intervened and the victim did not surrender any property. The defendant was charged with attempted armed robbery and convicted of that offense. On appeal, he claimed that the trial court should have instructed the jury on lesser-included offenses of attempted robbery, simple assault, and attempted theft. However, none of these instructions was required. There was no evidence to support an attempted robbery instruction because there was no evidence that the defendant committed the attempted robbery by any means except being armed with a simulated gun. Id. at 419, 737 P.2d at 395. Also, there was no evidence that the defendant "did or said anything that could be classified as simple assault. The jury's only choice was either to find him guilty of attempted armed robbery or not guilty of anything." Id. at 419-420, 737 P.2d at 395-96. Finally, there was no evidence to support an attempted theft instruction because no evidence suggested that the defendant intended to take the victim's property by any means other than by the threat of force. Id. at 420, 737 P.2d at 396.

Chapter 20, Forgery and Related Offenses

A.R.S. § 13-2002: Forgery:

Criminal simulation, A.R.S. § 13-2004, is not a lesser-included offense of forgery, § 13-2002, but rather is a completely separate offense. The word "object" as used in § 13-2004 does not include "written instrument" as used in § 13-2002. *State v. Rea*, 145 Ariz. 298, 300, 701 P.2d 6, 8 (App. 1985); accord, *State v. Livanos*, 151 Ariz. 13, 17, 725 P.2d 505, 509 (App. 1986).

A.R.S. § 13-2004: Criminal Simulation:

Criminal simulation, A.R.S. § 13-2004, is not a lesser-included offense of forgery, § 13-2002, but rather is a completely separate offense. *State v. Rea*, 145 Ariz. 298, 300, 701 P.2d 6, 8 (App. 1985); accord, *State v. Livanos*, 151 Ariz. 13, 17, 725 P.2d 505, 509 (App. 1986). The criminal simulation statute was intended to address the problem of forged art, historical items, or rare natural objects. Rea, id.

Chapter 23, Organized Crime and Fraud

A.R.S. § 13-2307: Trafficking in stolen property:

Trafficking in stolen property in the second degree, A.R.S. § 13-2307(A), requires proof that the defendant acted recklessly, while trafficking in the first degree, A.R.S. § 13-2307(B), requires proof that the defendant acted knowingly. Since proof of the higher mental state of "knowingly" is sufficient to show that the defendant acted "recklessly", trafficking in the second degree is a necessarily-included offense of trafficking in the first degree. State v. DiGiulio, 172 Ariz. 156, 161, 835 P.2d 488, 493 (App. 1992).

A.R.S. § 13-2310: Fraudulent Schemes:

Fraud in purchase or sale of securities, A.R.S. § 44-1991, is not a lesser-included offense of fraudulent schemes, A.R.S. § 13-2310, because each contains an element that the other does not. See State v. Cook, 185 Ariz. 358, 362, 916 P.2d 1074, 1078 (App. 1995).

A.R.S. § 13-2312: Illegal Control of an Enterprise or Illegally Conducting an Enterprise:

Illegally conducting an enterprise, A.R.S. § 13-2312(B), is a lesser-included offense of illegal control of an enterprise, A.R.S. § 13-2312(A). See State v. Schwartz, 188 Ariz. 313, 316, 935 P.2d 891, 894 (App. 1996).

Chapter 25, Escape and Related Offenses

A.R.S. § 13-2508: Resisting Arrest:

Disorderly conduct, A.R.S. § 13-2904, is not a lesser-included offense of resisting arrest, § 13-2508, because disorderly conduct requires proof of an element not necessary to the commission of resisting arrest, namely, that the offender has the intent to disturb the peace or quiet of a neighborhood, family or person, or the knowledge that he is doing so. State v. Diaz, 135 Ariz. 496, 497, 662 P.2d 461, 462 (App. 1983).

A.R.S. § 13-2510: Hindering Prosecution:

False reporting to law enforcement agencies, A.R.S. § 13-2907.01, is not a necessarily-included offense of hindering prosecution by deception, A.R.S. §§ 13-2510 and –2512, because one can hinder prosecution without communicating any information to a law enforcement agency – as, for example, by hiding a fugitive. In re Victoria K., 198 Ariz. 527, 530, ¶ 12, 11 P.3d 1066, 1069 (App. 2000). Further, false reporting is not a lesser-included offense of hindering prosecution by deception because one can commit false reporting without necessarily committing the corresponding elements of hindering prosecution. Id. at 531, ¶ 19, 11 P.3d at 1070.

Chapter 25, Escape and Related Offenses

A.R.S. § 13-2504: Escape in the Second Degree:

Attempted second-degree escape is a lesser-included offense of second-degree escape under A.R.S. § 13-2503. See State v. Herrera, 131 Ariz. 35, 36, 638 P.2d 702, 703 (1981).

Chapter 29, Offenses against Public Order

A.R.S. § 13-2904: Disorderly conduct

Because disorderly conduct, A.R.S. § 13-2904, requires proof of an element – namely, that the defendant intend or know that his conduct will disturb someone's peace and quiet – not found in drive by shooting, A.R.S. § 13-1209 disorderly conduct is not a necessarily-included offense of drive by shooting. State v. Cisneroz, 190 Ariz. 315, 317, 947 P.2d 889, 891 (App. 1997).

Disorderly conduct by reckless handling, displaying or discharging a firearm, A.R.S. § 13-2904(6), is a necessarily-included offense of aggravated assault under A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2), intentionally placing a person in reasonable apprehension of imminent physical injury using a deadly weapon or dangerous instrument. This is so because one cannot intend to place a person in fear of imminent injury without also intending to disturb the person. State v. Foster, 191 Ariz. 355, 357, ¶ 9, 955 P.2d 993, 995 (App. 1998), citing State v. Angle, 149 Ariz. 499, 507, 720 P.2d 100, 108 (App. 1985) (Kleinschmidt, J., dissenting), adopted by 149 Ariz. 478, 720 P.2d 79 (1986). However, disorderly conduct is not a lesser-included offense of §§ 13-1203(A)(1) and 13-1204(A)(1), aggravated assault by recklessly causing physical injury, because a person who recklessly injures another "need not, and probably does not, intend to disturb the other person." Foster, id. at ¶ 10. See also State v. Miranda, 198 Ariz. 426, 429, ¶ 13, 10 P.3d 1213, 1216 (App. 2000) [holding that Angle controls the issue, so disorderly conduct under A.R.S. § 13-2904(A)(6) is a lesser-included offense of aggravated assault under § 13-2904(A)(2), and disapproving State v. Cutright, 196 Ariz. 567, 2 P.3d 657 (App. 1999), for holding that, under Maricopa County Juvenile Action No. JV 133051, 184 Ariz. 473, 475, 910 P.2d 18, 20 (App. 1995), disorderly conduct has an additional element not found in aggravated assault, namely, that the State must show that the victim of a disorderly conduct was "at repose of mind and peaceful intent" before the defendant acted].

Disorderly conduct, A.R.S. § 13-2904, is not a lesser-included offense of resisting arrest, § 13-2508, because disorderly conduct requires proof of an element not necessary to the commission of resisting arrest, namely, that the offender has the intent to disturb the peace or quiet of a neighborhood, family or person, or the knowledge that he is doing so. State v. Diaz, 135 Ariz. 496, 497, 662 P.2d 461, 462 (App. 1983).

(Former) A.R.S. § 13-2905: Loitering:

Unlawful use of a narcotic drug was a lesser-included offense of loitering in a public place to use a narcotic drug, former A.R.S. § 13-2905(A)(3), "notwithstanding the disparity in punishment." State v. Bowling, 163 Ariz. 22, 785 P.2d 591 (App. 1989). Thus, the defendant’s plea to the loitering offense operated as a double jeopardy bar to prosecution for the unlawful use of the drug.

A.R.S. § 13-2907: False Reporting:

False reporting to law enforcement agencies, A.R.S. § 13-2907.01, is not a necessarily-included offense of hindering prosecution by deception, A.R.S. §§ 13-2510 and –2512, because one can hinder prosecution without communicating any information to a law enforcement agency – as, for example, by hiding a fugitive – and false reporting requires a communication. In re Victoria K., 198 Ariz. 527, 530, ¶ 12, 11 P.3d 1066, 1069 (App. 2000). Further, one can commit false reporting without necessarily committing the corresponding elements of hindering prosecution because hindering prosecution is committed only if the act of deception is done with the intent to hinder the prosecution of another person, whereas false reporting need not be done with any such intent. Id. at 531, ¶ 19, 11 P.3d at 1070.

A.R.S. § 13-2910: Cruelty to Animals:

Cruelty to animals is a lesser-included offense of interfering with a working animal. State v. Doss, 192 Ariz. 408, 410, ¶ 4, 966 P.2d 1012, 1014 (App. 1998).

Chapter 31, Weapons and Explosives

A.R.S. § 13-3102: Misconduct involving Weapons:

A lesser-included offense cannot be more serious than the greater offense. Thus, possessing a dangerous drug for sale, a class 2 felony, and possession of equipment to manufacture a dangerous drug, a class 3 felony, are not lesser-included offenses of possession of a deadly weapon during the commission of a felony drug offense, A.R.S. § 13-3102(A)(8), a class 4 felony. State v. Siddle, 202 Ariz. 512, 516, ¶ 11, 47 P.3d 1150, 1154 (App. 2002). Nor are those drug offenses necessarily-included offenses of possession of a deadly weapon during the commission of a felony offense, because "[a]ny drug felony will satisfy the requirements of" A.R.S. § 13-31002(A)(8). Id. at ¶ 12.

Chapter 34, Drug Offenses

Drug offenses generally:

Attempt to possess a controlled substance is a lesser-included offense of possession of that substance. Stubblefield v. Trombino, 197 Ariz. 382, 383, ¶ 4, 4 P.3d 437, 438 (App. 2000), citing State v. Cornish, 192 Ariz. 533, 538, 968 P.2d 606, 611 (App. 1998).

Possession of a drug for personal use is a lesser-included offense of possession of that drug for sale. Gray v. Irwin, 195 Ariz. 273, 276, ¶ 12, 987 P.2d 759, 762 (App. 1999), citing State v. Moroyoqui, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980); State v. Acinelli, 191 Ariz. 66, 68, 952 P.2d 304, 306 (App. 1997); Matter of Appeal in Pima County Juvenile Delinquency Action No. 12744101, 187 Ariz. 100, 101, 927 P.2d 366, 367 (App. 1996).

Possession of a smaller amount of controlled substance is a necessarily-included offense of possession of a larger amount of the same controlled substance. Thus, when the parties stipulated that the marijuana weighed over four pounds, but the jury made no finding of the actual amount, the defendant was properly found guilty of simple possession of marijuana in a usable quantity. See State v. Virgo, 190 Ariz. 349, 352, 947 P.2d 923, 926 (App. 1997).

Offering to sell illegal drugs is not a lesser-included offense of the completed crime of actual sale of illegal drugs. Both offenses are the same degree. State v. Padilla, 169 Ariz. 70, 72, 817 P.2d 15, 17 (App. 1991).

A.R.S. § 13-3405: Possession/sale of marijuana:

Possession of marijuana is a lesser-included offense of sale of marijuana, because it is impossible to complete a sale of marijuana without possessing it. Matter of Appeal in Pima County Juvenile Delinquency Action No. 12744101, 187 Ariz. 100, 101, 927 P.2d 366, 367 (App. 1996).

Simple possession of marijuana is a lesser-included offense of both transportation of marijuana and sale of marijuana, because a person cannot transport or sell marijuana without possessing it. State v. Chabolla-Hinojosa, 192 Ariz. 360, 364, ¶ 15, 965 P.2d 94, 98 (App. 1998), citing State v. Moroyoqui, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980). And this rationale applies to other drugs as well. Id. Nevertheless, possession of marijuana for sale is not a lesser-included offense of the former offense of simple transportation of marijuana2, "for the latter has no ‘for sale’ element and the former has no ‘transportation’ element." Id. at ¶ 16, 965 P.2d at 98, citing State v. McInelly, 146 Ariz. 161, 163-64, 704 P.2d 291, 293-94 (App. 1985).

A.R.S. § 13-3407: Dangerous Drug Offenses:

Possession of dangerous drugs (A.R.S. § 13-3407(A)(1)) is a lesser-included offense of transportation of dangerous drugs for sale (A.R.S. § 13-3407(A)(7)). *State v. Cheramie,* 218 Ariz. 447, 189 P.3d 374 (2008) (Vacating ¶ 5-14 of *State v. Cheramie,* 217 Ariz. 212, 171 P.3d 1253 (App. 2007)).

It is impossible to manufacture methamphetamine without possessing the equipment and/or chemicals for that purpose. Therefore, possession of chemicals and equipment for manufacturing a dangerous drug, A.R.S. § 13-3407(A)(3), a class 3 felony, is a necessarily-included offense of manufacturing the same dangerous drug, A.R.S. § 13-3407(A)(4), a class 2 felony. State v. Welch, 198 Ariz. 554, 557, ¶ 11, 12 P.3d 229, 232 (App. 2000). However, possession of drug paraphernalia, A.R.S. § 13-3415, is not a lesser-included offense of manufacturing a dangerous drug, both because the intent requirements of the statutes are different, and because § 13-3450 contains elements not found in the manufacturing statute. Id. at 558, ¶ 14, 12 P.3d at 533.

A.R.S. § 13-3415: Possession of Drug Paraphernalia:

Possession of drug paraphernalia, A.R.S. § 13-3415, is not a lesser-included offense of manufacturing a dangerous drug, A.R.S. § 13-3407(A)(4), both because the intent requirements of the statutes are different, and because § 13-3450 contains elements not found in the manufacturing statute. State v. Welch, 198 Ariz. 554, 558, ¶ 14, 12 P.3d 229, 233 (App. 2000).

Possession of drug paraphernalia, A.R.S. § 13-3415, is not a necessarily-included offense of personal drug possession or use, because one can possess paraphernalia without necessarily possessing or using a controlled substance, and one can possess drugs without possessing paraphernalia. State v. Holm, 195 Ariz. 42, 44, ¶ 10, 985 P.2d 527, 529 (App. 1998), disapproved on other grounds by State v. Estrada, 201 Ariz. 247, 250, ¶ 12, 34 P.3d 356, 359 (2001). However, "in actual practice, drug possession routinely requires a container of some sort, such as a plastic bag or an envelope. And similarly, drug use is regularly facilitated by a delivery device of some kind, such as a syringe, a wrapper, or a smoking pipe." State v. Estrada, 201 Ariz. 247, 252, ¶ 22, 34 P.3d 356, 361 (2001).

Chapter 36, Family Offenses

A.R.S. § 13-3613: Contributing to delinquency and dependency of a minor:

Contributing to the delinquency of a minor, A.R.S. § 13-3613, is a lesser-included offense of child molestation, § 13-1410. See State v. Brown, 191 Ariz. 102, 103, 952 P.2d 746, 747 (App. 1997); State v. Sanderson, 182 Ariz. 534, 543, 898 P.2d 483, 491 (App. 1995).

A.R.S. § 13-3623: Child abuse:

Negligent child abuse under circumstances other than those likely to produce death or serious physical injury is a lesser-included offense of intentional or knowing child abuse under circumstances likely to produce death or serious physical injury. State v. Mott, 187 Ariz. 536, 539, 931 P.2d 1046, 1049 (1997); State v. Mahaney, 193 Ariz. 566, 567-68, ¶ 8, 975 P.2d 156, 157-58 (App. 1999).

Negligent child abuse is a lesser-included offense of intentional or knowing child abuse. See State v. Albrecht, 158 Ariz. 341, 342, 762 P.2d 628, 629 (App. 1988).

Reckless child abuse and criminally negligent child abuse are lesser-included offenses of intentional or knowing child abuse, A.R.S. § 13-3626. State v. Van Winkle, 149 Ariz. 469, 471, 719 P.2d 1085, 1087 (App. 1986)

Child abuse, A.R.S. § 13-3623, is not a lesser-included offense of felony murder. State v. Lopez, 174 Ariz. 131, 143, 847 P.2d 1078, 1089 (1992).

Title 28 Offenses

A.R.S. § 28-622: Failure to Comply with Police Officer:

Failure to obey a police officer, A.R.S. § 28-622, may be a lesser-included offense of unlawful flight from a pursuing law enforcement vehicle, A.R.S. § 28-622.01. However, when the undisputed evidence showed that an officer signaled the defendant to stop but the defendant instead fled on his motorcycle, and the only issue was whether the defendant was justified in fleeing, the defendant was not entitled to a lesser-included offense instruction. This was so because under those facts, "If he is guilty, he can only be guilty of the offense charged and no other." State v. Gendron, 166 Ariz. 562, 566, 804 P.2d 95, 99 (App. 1990), vacated in part on other grounds, State v. Gendron, 168 Ariz. 153, 812 P.2d 626 (1991).

A.R.S. § 28-622.01: Unlawful Flight from Pursuing Law Enforcement Vehicle:

Failure to obey a police officer, A.R.S. § 28-622, may be a lesser-included offense of unlawful flight from a pursuing law enforcement vehicle, A.R.S. § 28-622.01. However, when the undisputed evidence showed that an officer signaled the defendant to stop but the defendant instead fled on his motorcycle, and the only issue was whether the defendant was justified in fleeing, the defendant was not entitled to a lesser-included offense instruction. This was so because under those facts, "If he is guilty, he can only be guilty of the offense charged and no other." State v. Gendron, 166 Ariz. 562, 566, 804 P.2d 95, 99 (App. 1990), vacated in part on other grounds, State v. Gendron, 168 Ariz. 153, 812 P.2d 626 (1991).

The crime of reckless driving, A.R.S. § 28-693, requires reckless disregard for the safety of persons or property, while the offense of unlawful flight, A.R.S. § 28-622.01, does not. Therefore, reckless driving is not a lesser-included offense of unlawful flight. State v. Mounce, 150 Ariz. 3, 5, 721 P.2d 661, 663 (App. 1986).

A.R.S. § 28-693: Reckless Driving:

In a vehicular homicide case, reckless driving, A.R.S. § 13-683, may be a lesser-included offense of second degree murder, A.R.S. § 13-1104, if the charging document describes the lesser offense of reckless driving. When the charging document said that the defendant, "under circumstances manifesting extreme indifference to human life, recklessly engaged in conduct which created a grave risk of death, and thereby caused the death" of the victim, the charging document described both second degree murder and reckless driving. Therefore, it was reversible error for the trial court not to have given a jury instruction on reckless driving. State v. Magana, 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994). Nevertheless, reckless driving is not a necessarily-included offense of second degree murder because it requires proof of an element – that the defendant was driving a vehicle – that is not required to prove second degree murder. State v. Sucharew, 205 Ariz. 16, 66 P.3d 59 (App. 2003).

The crime of reckless driving, A.R.S. § 28-639, requires reckless disregard for the safety of persons or property, while the offense of unlawful flight, A.R.S. § 28-622.01, does not. Therefore, reckless driving is not a lesser-included offense of unlawful flight. State v. Mounce, 150 Ariz. 3, 5, 721 P.2d 661, 663 (App. 1986).

Reckless driving, A.R.S. § 28-693, is not a lesser-included offense of aggravated assault, § 13-1204, because each offense requires proof of an element that the other does not. State v. Seats, 131 Ariz. 89, 92-93, 638 P.2d 1335, 1338-1339 (1981).

A.R.S. § 28-729: Driving on Roadways Laned for Traffic:

Unsafe movement on a roadway, A.R.S. § 28-729, is not a lesser-included offense of DUI. State ex rel. Dean v. Hantman [Root, Real Party in Interest], 169 Ariz. 414, 416, 819 P.2d 1000, 1002 (App. 1991).

A.R.S. § 28-1381: DUI:

Unsafe movement on a roadway, A.R.S. § 28-729, is not a lesser-included offense of DUI. State ex rel. Dean v. Hantman [Root, Real Party in Interest], 169 Ariz. 414, 416, 819 P.2d 1000, 1002 (App. 1991).

A.R.S. § 28-1382: Aggravated DUI:

Driving on a suspended driver's license, A.R.S. § 28-3473, is not a necessarily-included offense of aggravated DUI, § 28-1382. State v. Brown, 195 Ariz. 206, 208, ¶¶ 6-8, 986 P.2d 239, 247 (App. 1999); see also State v. Rodriguez, 198 Ariz. 139, 140, ¶ 2, fn 2, 7 P.3d 148, 178 (App. 2000). This is so because, by statute, aggravated DUI may be committed by being in actual physical control and while on any roadway, while driving while one's license is suspended, revoked, cancelled, or refused requires proof of driving on a public highway. Brown, id.

Driving on a suspended license, A.R.S. § 28-3473, is a lesser-included offense of aggravated DUI with a suspended license, § 28-1383(A)(1). State v. Rodriguez, 198 Ariz. 139, 140, ¶ 2, 7 P.3d 148, 178 (App. 2002).

A.R.S. § 28-1595(a): Failure to Stop:

Failure to stop, A.R.S. § 28-1595(a), is not a lesser included offense of felony flight, A.R.S. § 28-622.01. *State v. Fiihr*, 221 Ariz. 135, 137, 311 P.3d 13, 15 (App. 2008)

A.R.S. § 28-3473: Driving while License is Suspended, Revoked, Cancelled, or Refused:

Driving on a suspended driver's license is not a necessarily-included offense of aggravated DUI, § 28-1382. State v. Brown, 195 Ariz. 206, 208, ¶¶ 6-8, 986 P.2d 239, 247 (App. 1999); see also State v. Rodriguez, 198 Ariz. 139, 140, ¶ 2, fn 2, 7 P.3d 148, 178 (App. 2000). This is so because, by statute, aggravated DUI may be committed by being in actual physical control and while on any roadway, while driving while one's license is suspended, revoked, cancelled, or refused requires proof of driving on a public highway. Brown, id.

Driving on a suspended license, A.R.S. § 28-3473, is a lesser-included offense of aggravated DUI with a suspended license, § 28-1383(A)(1). State v. Rodriguez, 198 Ariz. 139, 140, ¶ 2, 7 P.3d 148, 178 (App. 2000).

The crime of driving on a suspended license is not always a lesser-included offense of aggravated DUI on a suspended license. State v. Robles, 213 Ariz. 268, 141 P.3d 748 (App. 2006). Particular charging language would be necessary in the indictment in order for driving on a suspended license to be a lesser-included offense of aggravated DUI on a suspended license. Id.

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1 However, attempts to commit preparatory offenses are not cognizable in Arizona. That is, one cannot "attempt to attempt" an offense, nor can one attempt to solicit an offense, attempt to conspire to commit an offense, or attempt to facilitate an offense. See State v. Sanchez, 174 Ariz. 44, 47, 846 P.2d 857, 860 (App. 1993).

2 A.R.S. § 13-3405(4) makes it illegal to transport marijuana for sale; the statute no longer criminalizes simple transportation. State v. Chabolla-Hinojosa, 192 Ariz. 360, 364, 16, fn. 2, 965 P.2d 94, 98, fn. 2. (App. 1998). A.R.S. § 13-1103: Manslaughter: